No. 89-1433

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Appellant,

—v.—

SHAWN E. EICHMAN, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 89-1434

UNITED STATES OF AMERICA,

Appellant,

—v.—

MARK JOHN HAGGERTY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

MEMORANDUM OF APPELLEES IN RESPONSE TO JURISDICTIONAL STATEMENTS

DAVID D. COLE
(Counsel of Record in
United States v. Haggerty)
Center for Constitutional Rights
666 Broadway-7th Floor
New York, NY 10012
(212) 614-6464

WILLIAM M. KUNSTLER
(Counsel of Record in
United States v. Eichman)
RONALD KUBY
13 Gay Street
New York, NY 10014
(212) 924-5661

(Counsel continued on Inside Cover)

KEVIN PECK
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-2800

NINA KRAUT
3815 Yuma Street NW
Washington, DC 20016
(202) 745-0300

COLIN KIPPEN
614 First Aenue–#300
Seattle, WA 98104
(206) 622-9050

CHARLES S. HAMILTON, III
650 Colman Building
811 First Avenue
Seattle, WA 98104
(206) 624-7364

ROBERT GOMBINER
NANCE, IARIA, & GOMBINER
315 Second Ave. South
Seattle, WA 98104
(206) 624-2448

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

MISCELLANEOUS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-1433

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN E. EICHMAN, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

No. 89-1434

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

MEMORANDUM OF APPELLEES IN RESPONSE TO JURISDICTIONAL STATEMENTS

I. INTRODUCTION

On March 13, 1990, the Solicitor General, on behalf of the United States, filed jurisdictional statements appealing from the decision and order of the United States District Court for the District of Washington of February 21, 1990 in United States v. Haggerty, and from the decision and order of the United States District Court for the District of Columbia of March 5, 1990 in United States v. Eichman. Appellees, defendants below, agree that this Court has jurisdiction over these appeals and that the questions presented are substantial. Although these cases could be summarily affirmed in light of this Court's decision last term in Texas v. Johnson, 109 S. Ct. 2533 (1989), appellees agree that the Court should grant plenary review.

II. STATEMENT OF THE CASE

These are the only two cases nationwide that the United States has prosecuted in the five months that the Flag Protection Act of 1989 (Act), Pub. L. No. 101-131, 103 Stat. 777 (amending 18 U.S.C. §700), has been in effect. The Act provides that "[w]hoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both." 18 U.S.C. §700(a)(1). An exception follows, providing that the law "does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled." 18 U.S.C. §700(a)(2). The statute defines "flag of the United States" as "any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed."

18 U.S.C. §700(b).

These cases arise out of political demonstrations that took place in, respectively, Seattle, Washington and Washington, D.C., in the days immediately following the Act's becoming law. In both cases, defendants admitted that they burned United States flags, and moved to dismiss the charges on the grounds that the Flag Protection Act is unconstitutional as applied to their politically expressive conduct and on its face.[1]

Appellees maintained below, and both district courts agreed, that dismissal is compelled by this Court's ruling last term in Texas v. Johnson. In Johnson, this Court held that while the government has an

[1]The government alleges that the flag burned in the Seattle demonstration at issue in United States v. Haggerty was a flag owned by the United States Postal Service. The flags burned in the incident that led to United States v. Eichman were indisputably appellees' own property.

interest in the flag's symbolic value, that interest is not sufficiently compelling to justify "criminally punish[ing] a person for burning a flag as a means of political protest." 109 S. Ct. at 2547. The government's interest in the flag permits it to persuade and encourage people to respect the flag, but does not permit it to compel the appearance of respect under penalty of imprisonment. Id.

Both district courts followed Johnson and ruled that the Flag Protection Act was unconstitutional as applied to appellees' politically expressive flagburnings. Each court first determined that appellees' conduct was sufficiently expressive to raise First Amendment concerns, a point no party disputed. Haggerty J.S. App. 5a; Eichman J.S. App. 9a-10a. Each court then concluded, as did this Court in Johnson, that because the government's interest in

protecting the flag is to preserve its symbolic value, and because that value can be impaired, if at all, only to the extent that conduct expresses disrespect for the flag, the governmental interest is necessarily "related to the suppression of free expression." Haggerty J.S. App. 10a; Eichman J.S. App. 11a; Johnson, 109 S. Ct. at 2542. Accordingly, the more lenient standard of First Amendment review articulated in United States v. O'Brien, 391 U.S. 367 (1968), is inapplicable, and the government must advance a compelling state interest.

The only interest Congress identified in enacting the Flag Protection Act was to preserve the flag's symbolic value, and in the district court proceedings the Government and counsel for the Senate and House Majority Leadership conceded that this was Congress's interest. But as both

district courts noted, that is the precise interest this Court found insufficient in Johnson. Haggerty J.S. App. 13a-15a; Eichman J.S. App. 14a-15a; Johnson, 109 S. Ct. at 2547.

In its amicus brief, counsel for the House Majority Leadership also articulated an interest in the flag as an "incident of sovereignty," but both courts found that interest analytically indistinguishable from the interest in the flag's symbolic value. Haggerty J.S. App. 12a-13a; Eichman J.S. App. 15a-16a. Therefore, both courts correctly concluded that the asserted governmental interests did not justify criminally punishing respondents for their politically-motivated flagburnings. Haggerty J.S. App. 13a-15a; Eichman J.S. App. 15a-17a.

Appellees also maintain that the Act is unconstitutional on its face, because it is

impermissibly content-based, overbroad, and vague.[2] It is content-based because it singles out for protection one symbol, with a particular content, among all symbols. It is therefore analytically indistinguishable from a statute prohibiting burning of the Democratic Party flag or copies of The Federalist Papers. Moreover, the Act prohibits only those forms of flag conduct which have historically been viewed as expressing protest or dissent.

In addition, several of the Act's specific terms are content-based. "Physically defile" was added to the statute expressly to reach acts that do no permanent

[2]Neither district court expressly reached appellees' facial claim, although each determined that the Flag Protection Act was indeed content-based, (Haggerty J.S. App. 13a-14a; Eichman J.S. App. 9a-10a), and not justified by a compelling government interest. Therefore, both courts implicitly found the Act facially unconstitutional as well. Appellees will continue to press their "as applied" and facial claims in this Court.

physical harm to the flag, but nonetheless "injure the flag as a symbol of the United States" and "which most definitely do[] give offense." 135 Cong. Rec. S12616 (daily ed. Oct. 4, 1989). The clause that prohibits maintaining the flag on the floor or ground was added, not because such conduct was deemed to harm the flag's physical integrity, but in direct response to appellee Scott Tyler's flag exhibit at the School of the Art Institute of Chicago in March of last year. See 135 Cong. Rec. S2811 (daily ed. March 16, 1989). And the Act creates an exception for those who burn "worn or soiled" flags, added because Congress did not want to "'make criminals out of every member of a veterans' post that has a ceremonial burning of a worn-out flag on Memorial Day." H.R. Rep. No. 231, 101st

Cong., 1st Sess. 9 (Sept. 7, 1989).[3]

III. WHILE SUMMARY AFFIRMANCE MIGHT BE APPROPRIATE, APPELLEES BELIEVE THAT THE CASES SHOULD BE SET FOR PLENARY HEARING

The United States effectively concedes that Johnson controls these cases. It admits that the unprecedented theory it advances for upholding the Act -- that flagburning should be deemed unprotected activity in the first instance -- is "in tension" with Johnson, something of an understatement. Haggerty J.S. 27; Eichman J.S. 25. And it asks the Court to "reconsider" an argument -- that the availability of other means of protest

[3]The Act is overbroad because it forbids a multitude of expressive acts that do no harm to the flag's symbolic value or physical integrity, and in its definition of "flag of the United States." It is vague because it gives no guidance for determining when a flag is sufficiently "soiled or worn" to permit its destruction, nor for determining when a flag is "in a form commonly displayed."

should justify criminalizing this one -- which the Court flatly rejected in both Johnson, 109 S. Ct. at 2546 n.11, and Spence v. Washington, 418 U.S. 405, 411 n.4 (1974). Haggerty J.S. 23 n.16; Eichman J.S. 22 n.15. In Congress, the Administration testified repeatedly and forcefully that "[i]n the face of the Court's holdings in Texas v. Johnson and Spence v. Washington, and especially given the sweeping reasoning in those cases, it cannot be seriously maintained that a statute aimed at protecting the Flag would be constitutional." Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 183 (1989) ("House Hearings") (Written Testimony of Assistant Attorney General William Barr,

Office of Legal Counsel).

In light of this Court's clear pronouncement less than one year ago in Johnson, and the two well-reasoned decisions below, appellees agree with Mr. Barr "it cannot be seriously maintained" that the Flag Protection Act is constitutional. This appeal might therefore be suitable for summary affirmance, and such a resolution would not be inconsistent with the literal terms of the statutory mandate that the Court take the appeal. However, appellees believe that the spirit of Congress's statutory directive, the constitutional implications of this case, and the strong public interest in the issues, weigh in favor of plenary hearing.

Should the Court choose the latter course, it should do so in a manner that will permit the issues to be briefed fully and carefully. As appellees have noted

previously, the schedule proposed by the Government, which would require submission of simultaneous briefs approximately two weeks after the Court decides to take the cases, replies one week later, and argument two days thereafter, gravely infringes upon appellees' due process rights, and is certainly not designed to provide for careful briefing of the issues.

Congress considered the legal questions posed by Johnson as applied to a federal flag statute sufficiently complex and important to require extended hearings over the course of several months.[4] The records of those hearings alone amount to 1,326 pages, and include testimony from three ex-Solicitors General, a sitting United States

---

[4]Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings on S. 1338, H.R. 2978, and S.J. Res. 180 Before the Senate Comm. on the Judiciary, 101st Cong., 1st Sess. (1989) ("Senate Hearings"); House Hearings, supra.

judge, and seventeen law professors, offering various analyses and advice. All three past Solicitors General -- Charles Fried, Robert Bork, and Erwin Griswold -- agreed that any statutory enactment to protect the flag would be unconstitutional.[5] Several professors disagreed, including Professor Laurence Tribe of Harvard Law School, who argued that a statute designed affirmatively to protect the flag as a symbol would withstand constitutional scrutiny.[6] And as noted above, Assistant Attorney General Barr argued on behalf of the Administration that <u>any</u> flag statute would be unconstitutional.[7]

In view of Congress's determination that

---

[5]Senate Hearings at 99 (Bork); <u>id.</u> at 248 (Griswold); House Hearings at 219 (Fried); <u>id.</u> at 199 (Bork).

[6]Senate Hearings at 99-124; House Hearings at 140-80.

[7]Senate Hearings at 64-139; House Hearings at 166-99.

the constitutional questions deserved careful and lengthy consideration before amending the flag statute, this Court should similarly allow sufficient time for a full and adequate airing of the legal issues before deciding the constitutional validity of the Act.

In the district court, the statute's defenders included the United States Attorney, the Senate, and the House Majority Leadership, all of whom offered differing analyses for upholding the statute. <u>See Haggerty</u> J.S. App. 4a ("While all three briefs argue that the Flag Protection Act is distinguishable from the law reviewed in <u>Johnson</u> and thus constitutional, they reach that end by differing and even conflicting means.") The United States has hinted in its Jurisdictional Statements that its theory in the Supreme Court will be different from that advanced in the lower

courts. In addition, several amici are likely to support the statute, and may offer still different analyses. To require appellees to file simultaneous opening briefs without even seeing the briefs of appellant and its supporters, and to respond to all of these varying positions in one week, would not be consistent with the importance Congress itself placed on this issue.

As noted previously, moreover, to expedite briefing to the extent suggested by the United States would denigrate appellees' due process right to brief the Court on a matter whose outcome could determine whether they will be incarcerated for up to one year. We trust that the importance of this issue is not lost on any of the parties or amici before the Court. That importance is disserved by such a truncated briefing and argument schedule as the Government has

proposed.[8]

V. CONCLUSION

While the Court could summarily affirm this case, appellees believe that probable jurisdiction should be noted and the case set down for a full hearing, with a briefing and argument schedule that permits the matters to be briefed with the care and consideration that they deserve.

---

[8]Should the Court elect to set the cases for plenary hearing, appellees believe that it would be appropriate to consolidate argument in the cases, provided that counsel for appellees are allowed to divide their portion of the argument equally. Appellees in the two cases have had and are likely to continue to have divergent interests, but counsel believe that those interests can be represented fully if William Kunstler represents the appellees in United States v. Eichman and David Cole represents the appellees in United States v. Haggerty, each sharing half of the argument time in a single argument. This would serve judicial economy while ensuring that appellees' interests are adequately represented.

Respectfully submitted,

DAVID COLE
(Counsel of Record in United States v. Haggerty)
Center for Constitutional Rights
666 Broadway - 7th Floo
NY, NY 10012
(212) 614-6464

WILLIAM KUNSTLER
(Counsel of Record in United States v. Eichman)
RONALD KUBY
13 Gay Street
NY, NY 10014
(212) 924-5661

KEVIN PECK
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-2800

COLIN KIPPEN
614 First Avenue - #300
Seattle, WA 98104
(206) 622-9050

CHARLES S. HAMILTON, III
559 Colman Building
811 First Avenue
Seattle, WA 88104
(206) 624-7364

NINA KRAUT
3815 Yuma Street NW
Washington, DC 20016
(202) 745-0300

ROBERT GOMBINER
Nance, Iaria, & Gombiner
315 Second Ave. South
Seattle, Wash. 98104
(206)-624-2448